fail to construct, or who fail to make substantial progress toward construction, must demonstrate both that their failure is attributable to causes beyond their control, and that they have taken taken all possible steps to expeditiously resolve whatever problems may exist. E.g., Hagedorn, supra. Failure to construct which is attributable to a private business judgment of the permittee is NOT a valid justification. E.g., Id.; Kin Shaw Wong, FCC 96-365, released September 25, 1996; New Orleans Channel 20, Inc. v. FCC, 830 F.2d 361 (D.C. Cir. 1987).

51. In the final paragraph of its Findings, RBC concedes

> [p]erhaps RBC could have moved more swiftly had it pulled the plug on the [Miami Tower Litigation], but such an action would have compromised its place in the market and abrogated rights to which it was entitled.

RBC Findings at 57-58. This is consistent with Mr. Rey's testimony (which, not surprisingly, is not the focus of attention in the Findings of either RBC or RBL) that RBC could have proceeded with construction if RBC had only dismissed the Miami Tower Litigation. Tr. 888. But, as Mr. Rey testified time and time again, in his view the permit (and any station which would have been built) was at that time "worthless", and he did not want to proceed. E.g., Tr. 780-81, 790, 872, 888, 916, 989.

52. Thus, in its Findings RBC has echoed Mr. Rey's testimony, conceding that the decision as to whether to proceed with construction was within RBC's control, and that RBC elected not to proceed because of private business reasons. In view of that concession, no waiver of Section 73.3534 or Section 73.3598 is warranted on this record.

Ex Parte Issue

53. With respect to the Ex Parte Issue, many of the core facts are generally agreed to by the parties. However, some facts and, more importantly, the conclusions to be drawn from the evidence are in substantial dispute.

54. RBC, the STS and Press [12/] all agree that Ms. Polivy received the Sandifer letter, that she spoke with Mr. Gordon on at least three-four occasions shortly prior to the July 1, 1993 meeting, that she arranged for Ms. Bush to contact members of the Bureau's staff in late June, 1993, that she herself contacted those same members to arrange for a meeting, and that such a meeting was held on July 1, 1993, attended by, inter alia, Ms. Polivy and Mr. Rey. The primary disagreements among the parties relate to (a) Ms. Polivy's state of mind, her intent, underlying her conduct, and (b) the legal consequences which should flow therefrom.

55. RBC takes the position that Ms. Polivy really did believe that the proceeding was not restricted as to her and RBC, and that that belief was not unreasonable. See, e.g., RBC Findings at 32. But the Court of Appeals has already disposed of that question adversely to RBC's position:

> [t]he record establishes that [RBC] could not reasonably have believed the proceeding to be unrestricted because the FCC had repeatedly informed [RBC]'s counsel that it considered the adjudication to be restricted within the meaning of its ex parte rules.

[12/] RBL did not offer findings or conclusions with respect to the Ex Parte Issue, although it generally supported the findings and conclusions offered thereon by RBC.

59 F.3d at 1370. Thus, RBC's threshold position is without basis. This is especially true in view of the fact that the record developed in this hearing has strongly reinforced the record which was before the Court relative to the repeated notices to Ms. Polivy.

56. Still, RBC attempts to make its case by relying on various meritless observations. For example, RBC relies considerably on the Commission's own May, 1994 decision apparently absolving RBC of any blame under the ex parte rules because of the supposed lack of clarity relative to the applicability of the ex parte rules to RBC's applications. RBC Findings at, e.g., 33. But reliance on that decision is completely unavailing in view of the fact that the Court of Appeals rejected the Commission's conclusions therein on precisely that point. The Court held

> [e]ven assuming the uncertainty of FCC precedent, however, the Commission's repeated notice to Polivy that it considered the proceedings restricted should have cautioned [RBC] about any belief to the contrary.

59 F.3d at 1371. Thus, that argument takes RBC nowhere. [13/]

57. In its Findings RBC also advances the notion that Ms. Polivy reasonably believed the proceeding to be unrestricted

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[13/] For its part, the STS seems to join RBC in the notion that the Commission's May, 1994 disposition of the ex parte matter may still enjoy some vitality. See STS Findings at, e.g., 56. But as discussed above, the basis for that disposition has been thoroughly discredited by the Court of Appeals. Moreover, the Presiding Judge (unlike the Commission in 1994) has now had the opportunity to compile a full evidentiary record concerning this matter. That record clearly establishes, even more than was the case in May, 1994, that Ms. Polivy could not reasonably have been confused or uncertain about the restricted nature of the proceeding.

as to her and RBC because Press's February, 1991 petition for reconsideration could somehow be characterized as a "petition for reconsideration of the denial of an informal objection" or a "petition for reconsideration of an informal objection". See, e.g., RBC Findings at 6. But Press's petition was nothing of the sort, as even a cursory reading demonstrates. Press's petition, filed pursuant to Section 1.106 of the Commission's rules, formally sought reconsideration of the action granting RBC's January, 1991 extension application. See Press Exh. 13, pp. 1-2. It is disingenuous in the extreme for RBC to continue to try to characterize Press's petition as something it was not.

58. RBC also mentions the fact that the Office of Inspector General ("OIG") had concluded that Ms. Polivy appeared to sincerely believe that the proceeding was unrestricted. See RBC Findings at 33. But the record developed in the instant proceeding suggests that Ms. Polivy may not have been completely truthful and candid in the information she provided to the OIG. See Press Findings at, e.g., 73, n. 44. Thus, any conclusions which the OIG may have reached based on its interview with Ms. Polivy are of questionable evidentiary value.

59. The same is true of RBC's Findings generally, to the extent that they are based almost exclusively on Ms. Polivy's testimony. As demonstrated in Press's Findings (at, e.g., 80), Ms. Polivy was not a credible witness. Moreover, after her testimony, additional matters were brought to the attention of the Presiding Judge which raised even more serious doubts as to her credibility. During the course of the discovery and hearing

herein, Ms. Polivy had advised the Presiding Judge that she had not participated as counsel for RBC in the Miami Tower Litigation. See Tr. 274, 961. But as Press showed in its Statement for the Record filed herein on July 12, 1996, Ms. Polivy had actively participated there -- a formal notice of appearance had been filed reflecting her as counsel, her name led the signature block of RBC's counsel on at least one pleading in that proceeding, and transcripts demonstrated that she had conducted direct and cross-examination of witnesses (and had even appeared as a witness). The dramatic demonstration of the inaccuracy of Ms. Polivy's statements to the Presiding Judge concerning her supposed lack of involvement in the Miami Tower Litigation cannot be ignored in assessing her credibility as a witness. [14/]

60. RBC also attempts to buttress its arguments by noting that Ms. Polivy apparently handed out some materials at the July 1, 1993 meeting, and the staff at that meeting were supposedly not "swayed" by RBC's presentation during the meeting.

[14/] In its response to Press's July 12, 1996 Statement for the Record, RBC and RBL did not deny or explain the discrepancies between Ms. Polivy's statements to the Presiding Judge and the materials submitted by Press with its Statement for the Record. RBC/RBL merely argued that Ms. Polivy's representations were "relevant -- if at all -- only as the basis for a charge of professional misconduct". RBC/RBL Opposition, filed July 25, 1996, at 12. While that assertion might be true in many cases, it most certainly is not true where the counsel has appeared as a witness with respect to crucial elements under a disqualifying issue. To the extent that RBC is relying almost exclusively on Ms. Polivy's testimony to meet its evidentiary burden under the ex parte issue, her credibility is unquestionably relevant here. And the matters set forth in Press's Statement for the Record clearly raise serious questions concerning her credibility.

RBC Findings at 13, 41. Whatever happened at the meeting, though, is largely irrelevant to the Ex Parte Issue, which is directed to Ms. Polivy's intent in making the contacts and arranging for the meeting prior to the meeting. By the time the meeting occurred, the ex parte violations had already happened, and anything that transpired at the meeting could only aggravate, and not ameliorate, RBC's misconduct.

61. Further, while Ms. Polivy did testify that she handed out a chronology at the meeting, see RBC Exh. 8 (App. A), Tr. 723-24, there is no evidence that any of the Bureau representatives had any significant opportunity to review that chronology or focus on its implications vis-à-vis the ex parte rules. Further, there is evidence -- in the consistent deposition testimony of Messrs. Stewart and Pendarvis and Ms. Kreisman -- that none of those Bureau officials recalled any communications from RBC or its counsel which related in any way to the applicability of the ex parte rules to the RBC applications. Press Findings at 75. Thus, the distribution at the meeting (notably, not prior to the meeting, when the Bureau staffers might have had a better opportunity to reflect on the chronology's implications) is not at all exculpatory here.

62. And, with respect to RBC's claim that the Bureau staff was supposedly not "swayed" by RBC's presentation at the July 1, 1993 meeting, the following portion of the opinion of the Court of Appeals is relevant:

> First, the record suggests that [RBC]'s ex parte meeting with FCC staff may have assisted it in developing the argument, ultimately found persuasive by

> the Commission, that [RBC] had not received a 24-month construction period.
>
> Second, we held in [ATX, Inc. v. United States Dep't of Transp., 41 F.3d 1522 (D.C. Cir. 1994)] that "[i]f the decision maker were suddenly to reverse course or reach a weakly-supported determination . . . we might infer that pressure did influence the final decision." 41 F.3d at 1529 [footnote omitted]. The Mass Media Bureau's quick reinstatement of [RBC]'s permit on the basis of flawed reasoning, . . ., falls squarely within the holding of ATX. . . .

59 F.3d at 1370. RBC did not seek rehearing or other review of that aspect of the Court's decision, nor did RBC offer any evidence during the instant hearing to counter the Court's observations. As a result, RBC cannot now claim that the Bureau staff appears not to have been "swayed" by RBC.

63. RBC also attacks Paul Gordon, the Bureau staff attorney who repeatedly advised Ms. Polivy that the RBC applications were subject to ex parte restrictions. RBC Findings at 37-39. While RBC suggests several times that Mr. Gordon may not have known or understood the ex parte rules, see id., the fact is that both the Commission and the Court of Appeals concurred with his judgment that the RBC applications were restricted. Any quibbles which RBC now advances are immaterial.

64. At times RBC seems to argue that the Gordon/Polivy conversations were not themselves ex parte violations. E.g., RBC Findings at 37-38. But whether or not those conversations did constitute separate violations is irrelevant here. What is relevant is the fact that those conversations, violations or not, did occur, and that during those conversations Mr. Gordon did advise Ms. Polivy that the proceeding was restricted. As a

result, Ms. Polivy was on clear notice of the restricted nature of the proceeding. And if she was on such notice, then any claim that she might make about uncertainty or misunderstanding or the like loses any credibility.

65. As discussed in Press's Findings at 58-64, Ms. Polivy was on repeated notice as to the restricted nature of the proceeding -- once in writing (in the Sandifer letter), and at least three or four times orally (from Mr. Gordon). [15/] In view of this, RBC's claim that any ex parte violation "was not made in the face of specific knowledge of the Commission's rules or prior warnings that such conduct was unacceptable" is completely without merit.

66. Both RBC and the STS argue that, even if Ms. Polivy did violate the ex parte rules, that violation should not be held against her client, RBC. RBC Findings at 40-41; STS Findings at 56. The gist of this argument seems to be that RBC cannot or should not be held accountable for misconduct on RBC's behalf by RBC's counsel.

67. But it is a "well-founded principle that counsel is the applicant's agent when appearing before the Commission, and applicants are, therefore, bound by counsel's actions." Pontchartrain Broadcasting Co., Inc., 7 FCC Rcd 1898, 1903, ¶18

[15/] RBC also notes in passing that Mr. Gordon's testimony concerning his conversations may not have "comported with" anyone else's recollections. RBC Findings at 8. This is a bizarre observation, as there is no evidence to indicate that anyone participated in these conversations other than Ms. Polivy and Mr. Gordon. There could thus not be any third party "recollections" relative to the substance of those conversations.

(Rev. Bd. 1992), review denied, 8 FCC Rcd 2256 (1993), aff'd, 15 F.3d 183 (D.C. Cir. 1994); James C. Sliger, 70 F.C.C.2d 1565, 1572 (Rev. Bd. 1979); Black Television Workshop of Los Angeles, Inc., 8 FCC Rcd 4192, 4200, n. 51 (1993), recon. denied, 8 FCC Rcd 8719, aff'd by mem. sub nom. Woodfork v. FCC, No. 94-1031 (D.C. Cir., filed September 18, 1995) ("the attorney is the client's agent and the client thus cannot escape responsibility for the inappropriate action or inaction of his attorney").

68. The decision in Black Television Workshop is especially relevant here. In that case, counsel for the corporate applicant had engaged in extensive, egregious misconduct before the Commission, unbeknownst to the corporation's original directors. One of those directors had made repeated efforts to learn about the counsel's misconduct, but had been foiled in those efforts by the counsel. Thus, that case involved a client (i.e., the original director, Ms. Woodfork) who was not at all involved in the counsel's wrong-doing, a client who was ignorant of that wrong-doing, a client from whom the counsel affirmatively withheld information concerning the wrong-doing despite the client's express and repeated inquiries. Nevertheless, the Commission held that the principle of client accountability for attorney misconduct was applicable to that director.

69. It would be arbitrary and capricious in the extreme to apply the policy of client accountability for attorney misconduct in the Black Television Workshop situation but not here. Here, Mr. Rey not only knew of the ex parte meeting in July, 1993, he attended it and participated in it. Further, it cannot be argued

that the ex parte rules are some kind of obscure technicality which Mr. Rey could not be expected to understand. As the Commission itself has specifically stated, ex parte misconduct is so fundamentally contrary to basic notions of due process that "[n]o law or regulation is required to establish the principle or to impose sanctions on those who disregard it." Ex Parte Communications, 1 FCC 2d 49, 50 (1965).

70. Accordingly, the arguments advanced by RBC and the STS concerning the non-culpability of RBC for Ms. Polivy's misconduct are mistaken. The Commission has a policy which, if consistently applied, must inculpate RBC and Mr. Rey.

71. Finally, RBC and the STS argue that the sanction to be imposed for any ex parte violation must in any event be less than disqualification. RBC Findings at 41; STS Findings at 57-58. The trouble with that assertion is that the misconduct at issue here is plainly egregious, having been undertaken -- with complete success -- by expert individuals knowing exactly whose buttons needed to be pushed by whom. This is not a case of some unfortunately inept applicant, acting on his own, ignorant of the rules, who innocently asks his Congressional representative to lend him a hand. See, e.g., Pepper Schultz, 4 FCC Rcd 6393 (Rev. Bd. 1989). Rather, it is a case of a conscious and knowing violation of the rules, a clear subversion of due process. As the Court of Appeals has observed, surreptitious ex parte attempts to influence agency proceedings run so counter to basic principles of government that

> [h]e who engages in such efforts in a contest before an

> administrative agency is fortunate if he loses no more than the matter involved in that proceeding.

WKAT, supra. Under these circumstances, even if RBC were not found to be disqualified under the Ex Parte Issue, at a minimum RBC's applications can and should be denied with prejudice as a result of RBC's ex parte violations.

Respectfully submitted,

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October 24, 1996

CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that on this 24th day of October, 1996, I have caused copies of the foregoing "Consolidated Reply of Press Broadcasting Company, Inc. To Proposed Findings of Fact and Conclusions of Law of Rainbow Broadcasting Company, Rainbow Broadcasting, Limited, and the Separate Trial Staff" to be hand delivered (as indicated below) or placed in the U.S. Mail, first class postage prepaid, addressed to the following individuals:

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